No. 83-1200

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., ASSIGNEE OF BERG MILL SUPPLY CO., INC.; CONSOLIDATED FIBRES, INC., PAPER FIBERS, INC., and SASSOON INTERNATIONAL CORPORATION,
Petitioners,

v.

AMERICAN MAIL LINE, LTD., PACIFIC WESTBOUND CONFERENCE, JAPAN LINE, LTD., KOREA MARINE TRANSPORT CO., LTD., MITSUI O.S.K. LINES, LTD., SEA-LAND SERVICE, INC., SHOWA LINE, LTD., *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS REPLY BRIEF

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PETITIONERS REPLY BRIEF

I

Certiorari Is Imperative To Reestablish The Correct Rule Of Law Mandated In This Case By The Legislative History Of The Shipping Act, The Shipping Act Itself, Relevant Decisions Of The Courts Thereunder, And By The Justice Department's Antitrust Enforcement Record In Other Similar Rate-Fixing Cases Against Rail, Ocean and Motor Carriers. Under the Correct Rule, Respondents' Unapproved, Discriminatory, Anticompetitive Rate-Fixing Is Plainly Not Immune From the Antitrust Laws.

It is vitally important to note from the very outset that, contrary to the Ninth Circuit's erroneous decision and the specious, misleading brief filed in this Court by respondents, this is *not* a case where petitioners challenge mere "*routine ratemaking contemplated by the plain language of the PWC Agreement.*"[1] This is *not* a situation where, in the course of myriad, day-to-day ratemaking activities, respondents unwittingly adopted an isolated rate which was later dis-

[1] See App. 4a, 5a; Respondents' Brief, pgs. 7, 10-11.

covered to be unreasonably high or merely violative of "broad normative rate criteria."[2] On the contrary, the complaint in this action charges that, *for more than 16 years*, the Pacific Westbound Conference and its giant ocean carrier members, which have held a transportation monopoly over 95% to 99% of this nation's West Coast wastepaper exports to the Far East, have *systematically* and *persistently* combined and conspired among themselves, *and with shippers who compete with the wastepaper exporters*, to restrain wastepaper exports through a three (3)-tier system of *grossly discriminatory, illegal, anticompetitive* rate-fixing that was never contemplated by—and which clearly violates—the Conference's approved charter agreement under Section 15 of the Shipping Act.[3]

It is plainly wrong, therefore, for respondents to suggest that here petitioner's only claim is that "ratemaking *authorized* by the Federal Maritime Commission constitute[s] illegal price-fixing."[4] On the contrary, the complaint charges that respondents operated *both* (a) *beyond the scope, and in violation*, of the Conference's approved agreement under the Shipping Act, and (b) *through totally unapproved rate-fixing agreements with petitioners' competitors*, the wood chip shippers, to impose and enforce their monopolistic, discriminatory, anticompetitive 3-tier rate-fixing system on the wastepaper shippers (App. 33a-46a).

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[2] See respondents' proposed Question No. 1; see also respondents' brief, pgs. 6, 7.

[3] Respondents speciously contend, at pages 2, 3 of their brief, that wastepaper rates are "among the lowest in PWC's tariffs," and that today "wastepaper rates are lower than woodpulp rates." This is untrue. The Maritime Commission charged in this case that respondents' wastepaper rates violate four (4) different sections of the Shipping Act, and that they are exceedingly discriminatory (App. 39a; 53a-54a). Both the Commission's ALJ and the D.C. Circuit ruled that said rates are "exorbitant," "outrageously high," detrimental to commerce and contrary to the public interest. *National Assn. of Recycling Ind.* v. *F.M.C.*, 658 F.2d 816, 823, 825 (D.C. Cir. 1980). Currently, respondents' wastepaper-woodpulp-wood chip rates to Japan, for example, are still exceedingly discriminatory and violative of both Article 2 of PWC's conference agreement and the Shipping Act (App. 45a, 68a).

[4] Respondents' brief, pgs. 1, 5.

Respondents themselves necessarily recognize in their brief: "*Carnation* held that the implementation of ratemaking agreements not approved by the Commission is subject to the antitrust laws."[5] And, respondents agree further that: "*Carnation* holds that agreements not filed and approved have no antitrust exemption."[6] Having made those concessions, respondents thereupon unqualifiedly state: "The wood chip contracts were entered into by individual defendant carriers with individual shippers and are not subject to PWC or FMC regulation. *No defendant [can claim] that these contracts have antitrust immunity.*"[7]

Plainly, therefore, the Ninth Circuit grievously erred when it granted sweeping antitrust immunity to respondents' 3-tier rate-fixing system in this case albeit the court recognized that (1) such discriminatory rate-fixing is *prohibited* by Article 2 of the Pacific Westbound Conference's approved charter agreement under Section 15 of the Shipping Act (App. 6a, 7a); and (2) that, in major part at least, respondents' rate-fixing system depends on secret rate-fixing agreements between the carriers and competing shippers that have *never been approved* under the Shipping Act, and which respondents now concede have no antitrust immunity whatsoever (App. 6a).

Petitioners respectfully submit that the *correct rule*, mandated in this case by the legislative history of the Shipping Act, the Shipping Act itself, the pertinent decisions thereunder, and by the Justice Department's recent antitrust enforcement record in cases of this kind against rail, ocean and motor carriers alike, is: *Since respondents' discriminatory, anticompetitive rate-fixing is (i) beyond the scope of, not contemplated or specifically authorized, and actually prohibited, by the Conference's approved charter agreement; and since it is (ii) in part at least the product of rate-fixing agreements between carriers and shippers not eligible for approval, and thus never approved, under the Shipping Act, such rate-fixing*

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[5] Respondents' brief, pg. 8.

[6] *Id.*, pg. 11.

[7] *Id.*, pgs. 12, 13.

is not immune from the antitrust laws under Section 15 of the Shipping Act.

The Shipping Act, of course, was enacted as a result of the Alexander Report—an exhaustive inquiry made by the House Merchant Marine Committee in 1914 into the practices of conferences such as the Pacific Westbound Conference.[8] The House committee received many complaints that conferences "completely dominate[d]" shippers with whom they dealt; subjected shippers to "excessive rates," and regularly discriminated between competing shippers in both rates and cargo space.[9] Thus, the Committee actually considered *total prohibition of conference rate-fixing agreements.*[10] Finally, however, the Committee recommended that only agreements *actually approved* in advance by a federal supervisory agency be lawful; but it insisted that "any such agreements, or parts thereof, [found] to be discriminatory or unfair in character, or detrimental to the commercial interests of the United States, be rejected and canceled."[11] Finally, the committee directed that "all modifications and cancelations of such agreements as may be made from time to time should also be promptly filed" and approved in advance.[12]

Consequently, when Congress enacted the Shipping Act in 1916, Section 15 required that all agreements among carriers, or between carriers and shippers, that fix rates, provide special rates, or otherwise control, regulate, prevent or destroy competition, be filed with the Maritime Commission.[13] The term '*agreement*' was broadly defined to include all "understandings, conferences and other arrangements." The Commission, in turn, was ordered by Congress to *disapprove* any agreement—or any proposed modification or cancelation

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[8] H.R. Doc. No. 805, 63rd Cong., 2d Sess. 1914.

[9] *Id.*, at pgs. 417, 418.

[10] *Id.*, at pgs. 415, 416.

[11] *Id.*, at pgs. 419, 420.

[12] *Id.*, at pg. 420.

[13] 46 U.S.C. § 814, 39 Stat. 733, 9 7 16. The Commission was first known as the Federal Maritime Board.

of a previously approved agreement—which is "*unjustly discriminatory or unfair as between . . . shippers [or] exporters*," or detrimental to "the commerce of the United States," or "contrary to the public interest," or violative of any provision of the Shipping Act.[14] Under Section 15, "any agreement not approved" is "unlawful." Modifications and cancelations of previously approved agreements are likewise unlawful until specifically approved by the Commission.[15] Finally, under Section 15, *only lawful, approved agreements, modifications and cancelations are exempt from the antitrust laws.*

Based on the aforesaid legislative history of the Shipping Act and the very restrictive statutory language employed by Congress in Section 15 itself, this Court has consistently construed the antitrust exemption thus provided for concerted rate-fixing activities to be *partial* only; it is strictly limited to "approved agreements, which are lawful under § 15, but does not apply to the implementation of unapproved agreements"; and it does *not* immunize discriminatory rate-fixing arrangements "which have the purpose and effect of stifling . . . competition" among shippers or exporters. *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 216, 86 S.Ct. 781 (1966); *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 488-93, 78 S.Ct. 851 (1958). Indeed, this Court has "emphasized that the freedom allowed conference members to agree upon terms of competition subject to Board approval is *limited* to the freedom to agree upon terms regulating competition *among themselves*" (356 U.S. 491); Congress "*flatly outlawed* conference practices designed to destroy . . . competition" of independent carriers, or among shippers or exporters whose ability to ship is dominated by a conference (356 U.S. 491-93).

Accordingly, courts have repeatedly *rejected* the proposition—again advanced by respondents here and erroneously sustained by the Ninth Circuit—that whenever a conference like PWC holds an approved conference agreement under

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[14] *Id.*

[15] *Id.*

Section 15 which simply legalizes and grants antitrust immunity to *collective ratemaking among conference members*, the conference and its members automatically have the additional right, lawfully and with antitrust immunity, to engage in discriminatory, anticompetitive rate-fixing against the shippers they dominate. In each case, the courts have ruled that discriminatory rate-fixing is *beyond the scope of basic approved conference agreements under § 15; is unlawful and totally without antitrust immunity* unless the conference agreement has been specifically *modified*, with Commission approval under § 15, to authorize such anticompetitive rate-fixing—and of course, § 15 prohibits Commission approval of rate-fixing that discriminates among shippers or exporters. *Pacific Westbound Conference* v. *Leval & Co., Inc.*, 269 P.2d 541 (S.Ct. Ore., 1954), *cert. denied* 348 U.S. 897; *Pacific Westbound Conference* v. *F.M.C.*, 440 F.2d 1303, 1309-10 (5th Cir. 1971), *cert. denied* 404 U.S. 881 (1971); *Isbrandtsen Co., Inc.* v. *United States*, 211 F.2d 51, 56-57 (D.C. Cir., 1954), *cert. denied* 347 U.S. 990; *River Plate and Brazil Conferences* v. *Pressed Steel Car Co.*, 227 F.2d 60, 63 (2d Cir., 1955); *Persian Gulf Outward Freight Conference* v. *F.M.C.*, 375 F.2d 335, 341-42 (D.C. Cir., 1967). In *Interpool, Ltd.* v. *F.M.C.*, 663 F.2d 142, 149 (D.C. Cir., 1980), the fundamental rule was stated as follows: "Although these conferences have been authorized to set rates and charges, the courts and the Commission have consistenly held that . . . general authorizations [under Section 15] do *not* permit conferences to act in a manner that will affect competition in a manner unforeseen when the conference agreements were approved."

The facts here militate even more strongly against respondents' claim of immunity than those in the decisions cited above because in this case Article 2 of PWC's approved agreement has always expressly *prohibited* rate-fixing that discriminates among shippers (App. 70a). That covenant against discriminatory rate-fixing was the essential predicate for § 15 approval by the Maritime Board in 1923. The subsequent practice by PWC and its members of constantly setting grossly discriminatory, anticompetitive rates for competing wood chip, woodpulp and wastepaper exporters plainly was not even remotely con-

templated when the PWC Agreement was approved; it violates the approved agreement; is outside its scope; and thus has no antitrust immunity in this case.

Contrary to respondents' brief, Justice Department antitrust enforcement policy against rail, motor and ocean carriers alike in similar cases fully supports and buttresses this conclusion. See *United States* v. *Baltimore & O.R.R.*, 538 F.Supp. 200, 206-208, *aff'd sub. nom. U.S.* v. *Bessemer & Lake Erie R.R.*, 717 F.2d 593, 599-600 (D.C. Cir. 1983) (railroads, with rate-fixing immunity under an ICC-approved agreement under § 5a of the Commerce Act, successfully criminally prosecuted under the Sherman Act for anticompetitive rate-fixing beyond scope of approved agreement); *United States* v. *Atlantic Container Line, Ltd.*, Crim. No. 79-271 (D.C. D.C. 1979) and *In Re Ocean Antitrust Litigation*, 500 F.Supp. 1235 (D.C. N.Y. 1980) (ocean carriers successfully criminally prosecuted under Sherman Act for imposing anticompetitive rates on shippers through rate-fixing arrangements not approved under § 15); and *United States* v. *Niagra Frontier Tariff Bureau, Inc.*, 49 Fed. Reg. 5388 (2/13/84), *printed in supplement to this reply brief* (motor carriers, with rate-fixing immunity under ICC-approved agreement, successfully sued under the Sherman Act for fixing anticompetitive rates in violation of approved agreement).[16]

Petitioners submit, therefore, that when the correct rule of law is applied to this case the Ninth Circuit's decision is unsustainable; and clearly the Maritime Commission's ALJ, whose ruling was substantially *affirmed* by the D.C. Circuit in the prior case, correctly ruled that here "PWC misued its conference agreement . . . so injuriously [that it] operated beyond the scope of the Commission's grant of partial immunity from the antitrust laws." *Nat. Assn. of Recycling Ind.* v. *F.M.C.*, at

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[16] In this case, as required by law, Justice Department attorneys simply appeared as counsel for amicus curiae Maritime Commission (*See Ocean Antitrust Litigation*, at 500 F.Supp. 1238-1239). In the Ninth Circuit, they declined (on behalf of the Commission) to take a position on whether the totally unapproved wood chip rate-fixing contracts necessitated denial of antitrust immunity here (See FMC's brief, Ninth Circuit, pg. 22).

658 F.2d 823, 829.[17] Imposition of antitrust liability in this suit under the Sherman Act will *not* be "*retroactive*" in any sense (See App. 4a), for here PWC's charter agreement has always precluded antitrust immunity for discriminatory, anticompetitive rate-fixing (App. 70a). Under § 15 and the foregoing authorities, PWC actually would have had to gain Commission approval—which is impossible under § 15—of a "*cancelation*" of Article 2 of its approved agreement for the type of anticompetitive rate-fixing challenged by the complaint in this case to have any claim to exemption from the antitrust laws. *Pacific Westbound Conference* v. *Leval & Co. Inc.*, *supra*, at 269 P.2d 543, 44; *Isbrandtsen Co., Inc.*, v. *U.S.*, *supra*, at 211 F.2d 56,57.

II

The Secret, Discriminatory, Anticompetitive Rate-Fixing Contracts Between PWC's Big Six Japanese Carrier Members And The Japanese Cartel Trading Company Shippers Are Part And Parcel Of The Overall Monopolistic Rate-Fixing Combination In Restraint Of Trade Alleged In The Complaint, Which Is Fully Actionable Under, And Not Immune From, The Antitrust Laws.

As mentioned above, respondents finally concede in their brief in this Court that none of the secret, long-term, discriminatory rate-fixing contracts made in this case between PWC's Big Six Japanese carrier members and petitioners' competitors, the Japanese cartel wood chip shippers, are immune from the antitrust laws.[18]

These non-exempt contracts lie at the very heart of the monopolistic rate-fixing combination in restraint of trade in U.S. wastepaper exports alleged in the complaint (App. 32a-

[17] The D.C. Circuit expressly stated: ". . . *[W]e affirm the ALJ* and hold in favor of petitioners" (658 F.2d 829). Contrary to respondents' brief (p. 4), the D.C. Circuit did *not* leave "undisturbed the Commission's conclusion that PWC had not operated outside the scope of its antitrust immunity." On the contrary, it *expressly* approved the ALJ's contrary holding (658 F.2d 823), and reserved for decision in a case under the Sherman Act the extent of respondents' liability under the antitrust laws (658 F.2d 825, 826).

[18] Respondents' brief, pgs. 12, 13.

37a; 42a-47a). This was repeatedly recognized by both the ALJ and the D.C. Circuit in the Shipping Act case (App. 58-59a; 658 F.2d 819-20, 824, 827). That rate-fixing combination—consisting of the PWC monopoly, PWC's carrier members, and petitioners' competitors, the woodpulp-wood chip shippers—continuously discriminated against and injured U.S. wastepaper shippers by constantly subjecting them to rigid, monopolistic, discriminatory, "outrageously-high" PWC rate-fixing, while competing woodpulp shippers were favored by PWC with preferential, low "open rates," and the wood chip shippers, principally the Japanese trading company cartels, were granted far more preferential, discriminatory, long-term rate-fixing contracts negotiated with their economic partners, the Big Six Japanese carrier members of PWC (App. 36a; 44-45a; *Conf. Ex. 99*).

The Ninth Circuit patently misunderstood the allegations of the complaint in this case when it suggested that the extremely discriminatory, secret rate-fixing wood chip contracts between the Japanese carriers and the Japanese cartel shippers are the "product of free competition" (App. 8a). The allegations regarding "free and open competition among defendant carriers" in the complaint were intended exclusively to describe *the inherently discriminatory nature* of respondents' 3-tier rate-fixing system in this case (See App. 35a, 36a). Wastepaper rates, as aforesaid, are always rigidly fixed and enforced by the PWC monopoly, where all rate competition among carriers is absolutely foreclosed (App. 33a-35a). Concomitantly, the PWC monopoly has always granted "*open rates*" to woodpulp shippers, so those shippers could obtain lower rates through competition among PWC's carrier members; while PWC's most influential members, the Big Six Japanese carriers, operated outside PWC, and combined with Japanese cartel wood chip shippers, to grant them far, far lower preferential rates through the aforesaid wood chip contracts. The last mentioned rates, constantly at least 40% lower than the PWC monopoly rates for wastepaper shippers, were regularly set for 10 years, while the competing wastepaper shippers were always made to operate at the whim of the PWC monopoly.

In conclusion, the D.C. Circuit's recent decision in *Sea-Land Service, Inc.* v. *United States*, 683 F.2d 491 (1982), demonstrates why certiorari is imperative to correct the Ninth Circuit's erroneous holding that these Japanese contracts are the "product of free competition." In *Sea-Land*, many of the U.S. flag respondents in this case presented sworn evidence to show why they, as well as U.S. shippers, are imperiled by the almost complete lack of free competition among the Big Six Japanese carrier members of PWC. The U.S. flag carriers testified that the Big Six Japanese lines actually operate as "a joint service"; that they "engage in bloc voting in . . . conferences"; and thus they have *"achieved functional control of the trans-Pacific conferences"* (683 F.2d 496-500). In addition, those U.S. flag respondents demonstrated that the Japanese government actually formulates all important agreements for the Japanese carriers, and that *"because of their close relationships with the Japanese trading houses, [the Japanese carriers] have a lock on a significant portion of* the cargo which moves" (683 F.2d 498-500).

Here, the Japanese lines have combined through the PWC monopoly to "lock out" U.S. wastepaper shippers from Far East markets, while they combined with their Japanese trading house partners to "lock them in." This rate-fixing combination in restraint of trade is not "free competition," as the Ninth Circuit ruled. Rather, it is totally repugnant to the antitrust laws under the decisions of this Court and other courts cited by petitioners in this case.

Respectfully submitted,

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Dated: March 1, 1984

APPENDIX TO REPLY BRIEF

Federal Register / Vol. 49, No. 30 / Monday, February 13, 1984
Notices

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Niagara Frontier Tariff Bureau, Inc., et al.; Proposed Final Judgment And Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b) through (h), that a Proposed Final Judgment, Stipulation and Competitive Impact Statement (CIS) have been filed with the United States District Court for the Western District of New York in *United States of America* v. *Niagara Frontier Tariff Bureau, Inc., et al.*, Civil Action No. 83-1313C. The Complaint in this case charges a violation of section 1 of the Sherman Act, 15 U.S.C. 1, and names as defendants the Niagara Frontier Tariff Bureau Inc. (NFTB), a motor carrier rate bureau, and five motor carrier corporations that are NFTB members: Bondy Cartage Limited; Dominion-Consolidated Truck Lines Limited; ICL International Carriers, Ltd.;Inter-City Truck Lines (Canada), Inc.; and TNT Canada Inc. The defendants are parties to the NFTB's collective ratemaking agreement which was approved by the Interstate Commerce Commission (ICC) and which authorizes them to set rates collectively with immunity from the antitrust laws provided that they adhere to the terms of the agreement and ICC regulations. The Complaint alleges that from at least as early as 1966 and continuing to at least 1981, the defendants and co-conspirators conspired to fix, raise and maintain prices and inhibit or eliminate competition for the transportation of freight by motor carrier between the United States and Ontario, Canada, without complying with the terms of the NFTB's collective ratemaking agreement and by otherwise engaging in conduct that either was not or could not be approved by the ICC. In furtherance of their unlawful conduct, the defendants were alleged to have (1) set rates and agreed on methods to inhibit competition through their participation in an unauthorized committee; (2) set rates without complying with the notice and record-keeping requirements of the NFTB agreement and ICC regulations; and (3) interfered with the

rights of other motor carrirs to make rates independent of the NFTB agreed-upon rates.

The proposed Final Judgment would require the defendants to conduct their collective ratemaking activites in strict compliance with the NFTB agreement and ICC and statutory procedures. Further, the Judgment would prohibit the defendants from entering agreements to limit competition, other than authorized agreements to approve or disapprove a particular rate proposal.

The proposed Final Judgment would also limit the collective ratemaking activities of the defendant motor carriers and the NFTB to ensure that they do not interfere with a motor carrier's statutorily-guaranteed right to price independently. In this regard, the Judgment would (1) prohibit the motor carrier defendants from discussing with any other carrier or the NFTB any independent rate prior to the rate's publication; (2) prohibit the defendants from discussing an independent rate for 90 days after the issued date, except that it would permit discussions after the issued date concerning lowering the corresponding NFTB rate to an amount not lower than the independent rate; any such discussion could take place only in an authorized rate committee or subcommittee meeting; (3) prohibit the NFTB for 90 days after the issued date of an independent rate from processing rate proposals that could cause collective undercutting of the independent rate; and (4) require the defendant motor carriers to certify that their rate proposals for collective action were not aimed at forcing any other carrier to raise its rates. Greater detail is provided in the proposed Final Judgment and CIS, copies of which appear below.

Public comment is invited within the statutory 60-day comment period. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be directed to Elliott M. Seiden, Chief,

Transportation Section, Antitrust Division, Department of Justice, Washington, D.C. 20530 (telephone: (202) 724-6349).

Joseph H. Widmar,
Director of Operations, Antitrust Division.

United States District Court for the Western District of New York

United States of America, plaintiff, v. Niagara Frontier Tariff Bureau, Inc., defendants; Civil Action No. 83-1313C; Judge Curtin.

Filed: January 19, 1984.